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Brief of Pritchard & Sizer
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Filed Dec. 7, 1901.

Brief for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON, RESPONDENTS.

PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

ROBERT PRITCHARD AND J. B. SIZER, COUNSEL FOR PETITIONER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

Ex Parte CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,

Petitioner.

BRIEF FOR PETITIONER.

I.

That the contract sued on in the original bill was made in the State of Tennessee, and not in the State of Alabama, is a proposition as to which, it is respectfully submitted, there can be no reasonable doubt. Denson made a written application for a loan from petitioner; and while he wrote and signed this application in the State of Alabama, it did not constitute a contract until his proposition was accepted; and this acceptance took place in the State of Tennessee.

"Where the transaction consists in a proposition from one party and an acceptance from the other, the law * * * * is that of the place to which the proposition is sent and from which the receiver forwards his assenting reply. *It is at this place that the purposes of the parties for the first time coalesce.*"

Wharton on Conflict of Laws, Sec. 421.

The principle is involved and settled in the cases of:

Tayloe v. Merchants' Fire Ins. Co., 9 How. 390;
Holder v. Aultman, 169 U. S. 81;
Western v. Genessee Mut. Ins. Co., 12 N. Y. 258;
Allgeyer v. Louisiana, 165 U. S. 578.

In Holder v. Aultman, supra, this Court said that it was "at Akron, in the State of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, *for the first time*, became a valid and binding contract between the parties. It cannot, therefore, be considered as 'made' within the statute in question, *at any earlier time, or other place.*"

In Tayloe v. Merchant's Fire Ins. Co., supra, the Court said that "on acceptance of the terms proposed, transmitted by due course of mail to the company, *the minds of both parties have met on* the subject, in the mode contemplated at the time of entering upon the negotiation, *and the contract becomes complete.*"

9 How. 400.

It is true that the question directly involved in that case was not *the place where*, but the *time when* the contract was made; but if it was made *when* the proposition of the one party was accepted by the other, then necessarily it was made *where* that acceptance took place.

In Western v. The Genessee Mutual Ins. Co., supra, the Court said:

"When the application was received and approved by the company, and the policy executed and put in course of transmission to the insured, the contract was complete and both parties became bound. * * * *

"The contract was consummated *by the final assent on the part of the company.*"

II.

The State of Alabama had no right to forbid the making by its citizens of contracts outside the State, and with citizens of other States, or to interfere with or prohibit the performance of such contracts.

"Has not a citizen of a State, under the provisions of the provisions of the Federal Constitution above mentioned, a right *to contract outside of the State* for insurance" [or for a loan] "on his property—a right of which State legislation cannot deprive him? We are not alluding to *acts done within the State by an insurance company or its agents doing business therein*, which are in violation of the State statutes. * * * When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, *where the contract was made outside the State, and as such was a valid and proper contract.* * * * * * *

"The mere fact that a citizen may be within the limits of a particular State, does not prevent his making a contract outside its limits, while he himself remains within it."

Allgeyer v. Louisiana, 165 U. S. 578, 590, 591, 592.

It follows, we think, that the State of Alabama had no power to prevent Mr. Denson from subscribing for stock and becoming a stockholder in the petitioner; and it is very clear that the provisions of the constitution and statutes of Alabama, quoted in the petition and in the opinion of the Circuit Court of Appeals, have no application whatever to the transaction by which Mr. Denson became a stockholder in petitioner.

III.

The petitioner is chartered and organized under the public statutes of Tennessee authorizing the creation of corporations for carrying on the business of building and loan associations; and the loan in controversy was made in accordance with the

power conferred on petitioner by its charter, and in the manner prescribed by its by-laws.

Stipulation, Record p. 75.

The statutes under which petitioner was chartered and organized provide that the money in the treasury shall be offerred for loan at stated meetings of the board of directors and that "the stockholder who shall bid the highest premium for the preference or priority *shall be entitled* to receive a loan of two hundred dollars for each share held by such stockholder."

Shannon's Code of Tennessee, Secs. 2136, 2151, 2177;
Tennessee Acts 1875, Ch. 142, Sec. 14;
Tennessee Acts 1889, Ch. 267, Sec. 1;
Tennessee Acts 1893, Ch. 12, Sec. 1.

The bid of Mr. Denson was the highest that was offered for the sum of money which he desired, at the meeting at which his application was presented, and the security offered by him was satisfactory.

Record, p. 24.

He therefore became entitled, by virtue of his contract of membership, to obtain the loan; he acquired a vested right to it, which he could have enforced against the association by suit; and being a right which could have been enforced by suit, the association properly yielded to it without suit, and the State of Alabama had no power or right to interfere with the performance of such a contract.

While the power of the States to impose conditions upon foreign corporations doing business within their limits is recognized and undisputed, "manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations."

We submit that the case is directly within the principle decided by this court in Bedford v. Eastern Building and Loan Association, 181 U. S. 227.

IV.

Even if the taking of the note and mortgage and payment of the money loaned to Denson could be held to constitute doing business by the Association in Alabama, the Association would still be entitled to collect the indebtedness sued on, under the doctrine of the Bedford case, supra. But it is submitted that neither the taking of the note and mortgage or the payment of the money, constituted a transaction of business by the Association in Alabama.

The note and mortgage were drawn in Tennessee, and by their express terms were payable there. The note is dated in its face at Chattanooga, Tennessee, and expressly stipulates

that it "is made with reference to and under the laws of the State of Tennessee."

Record p. 8.

The money was paid by a check drawn in favor of Mr. Denson on a bank in Chattanooga, Tennessee; and while Mr. Denson got the money on it from a Gadsden bank, it was not paid by the Association until presented at the Chattanooga bank on which it was drawn.

Record, p. 24.

The petitioner's part of all these transactions was performed in the State of Tennessee; and only those acts which the borrower was required to do *as a condition precedent* to the loan of the money to him, were performed in Alabama.

The place of the note itself was the State of Tennessee, where it was to be paid, and by the laws of which the parties agreed it should be construed and governed.

Wharton on Conflict of Laws, Secs. 389, 399;
Andrews vs. Pond, 13 Peters, 65, 78;
Pritchard vs. Norton, 106 U. S. 124;
London Assurance vs. Companhia De Moagens. 167 U. S. 149, 160.

The mortgage is a mere incident to the debt, and its situs is that of the debt which it secures although it may cover property located elsewhere.

Lauter v. Jarvis-Conklin Mortgage Trust Co., 85 Fed. Rep. 894, 896;
Pioneer Bldg. & Loan Asso. v. Cannon, 96 Tenn. 599;
Sullivan v. Sheehan, 89 Fed. Rep 247;
Electric Lighting Co. of Mobile v. Rust, 117 Ala. 680;
U. S Savings and Loan Association v. Shain, 8 North Dakota, 136.

V.

The only representative the petitioner had in Alabama at the time this loan was made was a traveling soliciting agent who was employed to solicit subscriptions to petitioner's stock.

It is submitted that the case of Beard v. The Union & American Publishing Co., 71 Ala. 60, is direct authority in support of the proposition that the transactions of this agent did not constitute a doing of business in Alabama by the petitioner within the meaning and inhibition of the laws relied on.

But if we are mistaken in this, it is fully shown that the contracts involved in this suit *were not made* by this soliciting agent, and that he had no part in the transactions culminating in the loan except to transmit the papers back and forth. It is insisted, therefore, that even if the Association infringed the laws of Alabama by sending this soliciting

agent into the State, and thereby made itself amendable to the penalties prescribed for violation of the laws, it did not on that account forfeit the right to enforce contracts which it made in the State of Tennessee, with citizens of Alabama. The utmost extent to which the Alabama courts have gone in construing these laws is to hold that contracts made *in Alabama* by non-resident or foreign corporations, without compliance with the laws, are unenforcible.

VI.

The Circuit Court of Appeals says in its opinion that "it is perfectly clear that all the business of loaning money to Denson, *with the single exception that the Association in Tennessee said 'Yes,'* was transacted in Alabama."

Record, p. 64.

Conceding that this view of the case is correct, it is respectfully submitted that it sustains our contention that the contract sued on was made in Tennessee, and therefore was not a doing of business in Alabama. For there was no contract until the association said "yes" to Denson's application; and *when* and *where* it said "yes," *then* and *there* was the contract made. We think the proposition is fully sustained by the authorities cited under paragraph I. of this brief.

With all deference to the opinion of the learned Court of Appeals, it is respectfully submitted that it has been misled to the conclusion that this contract is unenforcible by overlooking the point suggested in paragraph V. of this brief; namely, that it is immaterial, so far as this case is concerned, if the association was illegally doing business in Alabama when this loan was made, unless *the very contract here sued on* was made in that State. The State of Alabama has not undertaken to prohibit the enforcement by the association of its contracts lawfully made in the State of Tennessee, as a penalty for the illegal transaction by it of business in the State of Alabama; nor could it do so.

It is further submitted that the Court of Appeals is mistaken in the statement that the payment of the money loaned took place in Alabama. The undisputed evidence is that the association had no money in the State of Alabama at the time the check in favor of Denson, for the amount loaned him, was drawn; and that the money was paid by the Chattanooga bank on which it was drawn, out of funds on deposit therein belonging to the association.

Record, p. 24.

It is true the cashier of the Gadsden bank, by which the check was cashed for Denson, says that his best recollection is that he paid the money on the check "under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was

drawn, would pay the same on presentation." He further says that he "transmitted the check to our Chattanooga correspondent and the same was paid"; and that he paid the money to Denson on this check "as on any other negotiable exchange."

Record, pp. 58, 59.

But this evidence, instead of in any way contradicting, directly sustains and corroborates the contention that the association paid over the sum of money which it had agreed to lend Denson, in the State of Tennessee. The Gadsden bank, understanding from the association, or the Chattanooga bank, or both, that the check would be paid on presentation, was willing to, and did, take it and advance the money on it "as on any other negotiable exchange"; and the check was then forwarded to Chattanooga and paid to the person by whom it was presented, in accordance with the order of Denson, the original payee.

It is further submitted that the apprehension, expressed by the Court of Appeals, that this and other foreign corporations of the same kind "may safely flood the State of Alabama with soliciting agents, make all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions as though incorporated therein" without complying with the requirements of the Alabama laws, should not be of controlling force in the determination of this case. The penalties imposed for violation of the laws in question are ample and stringent; and no reason is apparent why the courts should seek to add to the severity of the laws by reading into them additional penalties. But if the Courts have power in their discretion to impose additional penalties to those prescribed by the statutes, it is submitted that the fact that the violation of the laws, if they have been violated, shown in the present case was not wanton or wilful, but was due wholly to the ignorance on the part of the officers of the association of the laws of a foreign State, is a sufficient reason, especially in a court of equity, why that discretion should not be exercised.

Respectfully submitted,

ROBERT PRITCHARD,

J. B. SIZER,

Of Counsel for Petitioner.

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W. G. Prichard for Petitioner.

BRIEF FOR PETITIONER.

Filed Oct. 31, 1902.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 206.

THE CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON.

QUESTIONS FROM THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

STATEMENT, ASSIGNMENT OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

ROBERT PRITCHARD AND J. B. SIZER,
COUNSEL FOR PETITIONER.

(16,345)

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 206.

THE CHATTANOOGA NATIONAL BUILDING AND LOAN ASSOCIATION, PETITIONER,

vs.

WILLIAM H. DENSON AND ROSA E. DENSON.

STATEMENT, ASSIGNMENT OF ERRORS AND BRIEF OF COUNSEL FOR PETITIONER.

STATEMENT OF CASE.

The original bill in this cause was filed in the Circuit Court of the United States for the Southern Division of the Northern District of Alabama to collect an alleged indebtedness of defendants to complainant and to foreclose a deed of trust or mortgage given to secure payment of said indebtedness.

Record, pp. 1–10.

The defendants in their answer denied most of the allegations of the bill and set up various matters of defense, but the only defense insisted on, and the only one involved in this Court, is the one set up in the ninth paragraph of the answer; namely, that the complainant was a foreign corporation, not organized under the laws of Alabama, that the transaction sued on involved a doing of business by it in the State of Alabama, that it had not complied with certain requirements prescribed by the constitution and statutes of Alabama for foreign corporations doing business in that State, and that therefore the loan and mortgage sued on were void and unenforceable.

Record, pp. 18–19.

The Circuit Court rendered decree in favor of complainant for the sum of $2,841.15, which it adjudged to be the balance due from defendants on the note sued on, and $200 attorney's fee, and ordered sale in foreclosure of the mortgage given to secure the note

unless the amount adjudged in favor of complainant, with interest and costs, should be paid within ninety days from entry of the decree.

Record, pp. 53–56.

The defendants filed a petition for appeal, and in support thereof assigned twenty-one errors in the decree of the Circuit Court, all of which, except the twenty-first, were predicated on the proposition that the loan, note and mortgage sued on were void because they involved a doing of business in the State of Alabama without compliance with the constitutional and statutory requirements of that State. The twenty-first error assigned is that the Court erred in decreeing sale in bar of the dower right of Mrs. Rosa E. Denson.

Record, pp. 56–60.

The Circuit Court of Appeals held that the note and mortgage sued on were illegal and unenforceable because of the failure of complainant to comply with the Alabama laws, and reversed the decree of the Circuit Court and remanded the case with instructions to dismiss the bill.

Opinion Circuit Court of Appeals, record pp. 68, 73.

Decree Circuit Court of Appeals, record p. 65.

Complainant thereupon filed a petition in this Court for a writ of certiorari under the sixth section of the Circuit Court of Appeals act, which petition was granted.

Record, p. 74.

The petitioner is a corporation organized under the statutes of the State of Tennessee, authorizing the creation of corporations for carrying on the business of building and loan associations. Its principal office and place of business was at the time the loan in controversy was made and at the time the suit was brought, and continuously between those dates, in the city of Chattanooga, Tennessee. The loan in controversy was made "in accordance with the power and authority conferred on complainant by its charter and in the manner prescribed by its by-laws."

Stipulation, record, p. 64.

The defendants were at the time the loan was made and at the time the suit was brought, and continuously between those dates, citizens and residents of the State of Alabama.

Petitioner, at the time the loan was made, had no local office or agent in Alabama, but it had in its employ a traveling agent named Kennedy, whose business it was to solicit subscriptions to stock, and submit applications for loans.

On April 25th, 1895, defendant, W. H. Denson, at Gadsden, Alabama, signed a written application for fifty shares of stock in petitioner, which application was forwarded by the petitioner's traveling agent, Mr. Kennedy, to petitioner's home office in Chattanooga, Tennessee, where the stock was issued on May 23rd, 1895, in accordance with the application, and was returned to Mr. Kennedy to be by him delivered to said Denson.

Ex. Nos. 2 and 3 to Denson's dep., Rec. pp. 45, 46.

Stipulation, Rec. p. 20.

On the same day on which he applied for his stock, Mr. Denson also signed a written application, addressed to the president and board of directors of petitioner at Chattanooga, Tennessee, for a

loan of $2500 on the fifty shares of stock he had applied for. He offered a premium of $2500 for the loan, and proposed to secure the loan and premium, if his application should be granted, on certain real estate in Gadsden, Alabama, which he represented in the application was of the value, in all, of about $9000. This application was accompanied by the report of two disinterested parties, fixing the value of the property which Denson proposed to mortgage at $8000, and the certificate of a local attorney with reference to the condition of the title.

Ex. No. 4 to Denson's dep., record, pp. 48–51.

This application, with the other papers accompanying it, was submitted to petitioner's board of directors in Chattanooga, Tennessee, at a stated meeting, along with other applications of a similar nature, whereupon said application was duly considered and granted and the loan was directed to be made. The note and deed of trust in question were then prepared at Chattanooga, Tennessee, and forwarded to the agent, Kennedy, through whom the application had been submitted, and at the same time a check for the amount of the loan was drawn by petitioner on the Chattanooga National Bank, of Chattanooga, Tennessee, in favor of defendant W. H. Denson, and was sent to a man named Goodhue, in Gadsden, Alabama, with instructions to him to deliver the check to Mr. Denson when he and his wife should have executed the note and deed of trust. Petitioner had no money on deposit in the State of Alabama at this time; and the check to defendant Denson, having been delivered to him on the execution of the note and mortgage, was subsequently presented, with his endorsement, at the bank on which it was drawn, and was there paid out of funds on deposit in said bank belonging to petitioner.

Rec. pp. 20–21.

Ex. No. 1, dep. of W. H. Denson, Rec. p. 45.

Certain deductions were made from the $2500 borrowed by Mr. Denson and the check was for $2367.50, the net amount to which he was entitled. The propriety of these deductions was not seriously controverted in the Circuit Court, and was not challenged by the assignment of errors filed by defendants with their petition for appeal; and it is not deemed necessary to discuss that question here.

With reference to payment of the check, it further appears that Mr. Denson cashed it at the First National Bank of Gadsden, Alabama. The cashier of that bank says that his best recollection is that he "paid the money on the check under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." He further says that the money was paid by his bank to Mr. Denson on this check, "as on any other negotiable exchange."

Rec. p. 51

In other words, Mr. Denson transferred the check by endorsement to the First National Bank of Gadsden, and received from that bank the amount of money the check called for; and then this bank, as the holder and owner of the check, forwarded it to Chattanooga and collected it from the bank on which it was drawn.

At the time the loan here in controversy was made the complainant association had been for some time soliciting subscriptions to its stock in the State of Alabama, through traveling agents, and had received, through such agents, several other applications for loans from residents of Alabama, which applications had been submitted and acted on in the same manner as the Denson loan, and several others had been granted, and loans made on them, prior to the date of this transaction. Complainant had paid the tax or license fee required by the laws of Alabama from foreign corporations doing or proposing to do business in that State, and its officers supposed and understood that the payment of this fee or tax entitled them to do business in Alabama, without more. Subsequently, and some months after the loan to Denson was made, complainant's officers were informed by an Alabama attorney of the other statutory and constitutional requirements invoked by the defendants in this case, and thereupon it promptly complied with them.

Rec. pp. 21–22.

These requirements or provisions are as follows:

"4. No foreign corporation shall do any business in this State without having at least one known place of business and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon any agent anywhere in this State." Const. Ala., Art. XIV.

"1316. Foreign corporations must file instrument of writing designating agent and place of business in this State. Every corporation not organized under the laws of this State, shall, before engaging in or transacting any business in this State, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this State and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this State." Code Ala., 1896.

"1318. Unlawful for foreign corporation to transact business in this State before declaration filed; penalty. It is unlawful for any foreign corporation to engage in or transact any business in this State before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this State without complying with the provisions of the two preceding sections shall, for each offense, forfeit and pay to the State the sum of one thousand dollars." Ib.

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty. It is unlawful for any person to act as agent or transact any business directly or indirectly, in this State, for or on behalf of any foreign corporation which has not designated a known place of business in this State and an authorized agent or agents residing thereat, as required in this article; and any person so doing shall, for each offense, forfeit and pay to

the State the sum of five hundred dollars." Ib.
Record, pp. 68–69.

ASSIGNMENT OF ERROR.

1. The Circuit Court of Appeals erred in holding that the loan to defendant Denson sued on in this case involved a doing or transacting of business in the State of Alabama by the petitioner, within the spirit and intent of the Alabama laws relied on.
2. If the loan did involve the transaction of business in the State of Alabama by petitioner, it was nothing more than the carrying out of a contract lawfully made in the State of Tennessee; therefore the Circuit Court of Appeals should have held that petitioner was bound to comply with the terms of this contract, even if it had to go into the State of Alabama to do so, and that the State of Alabama had no right or power to interfere with the performance of such contract.
3. The Circuit Court of Appeals should not have held the note and mortgage unenforcible, and directed the dismissal of the bill, even if the transaction was in violation of the Alabama laws and the State of Alabama had the power to forbid it.

BRIEF.

I.

THE CONTRACT FOR THIS LOAN WAS MADE IN TENNESSEE.

The petitioner's agent, to whom Mr. Denson submitted his application for the loan, had no authority to grant the application and make the loan, and did not assume to do so. He forwarded the application to Chattanooga, Tennessee, and it was there acted on and granted. Where, then, was the place of the contract?

Manifestly not in Alabama, for the *making of the application* did not constitute a contract; nor did the *delivery of it* to petitioner's traveling agent; or the *mailing of it* by that agent to Chattanooga.

It would seem clear, then, that until this application *was granted* there was no contract, for there was no meeting of minds. There was a mere proposition, which might have been withdrawn at any time before its acceptance, and which might be either accepted or rejected by the association. And inasmuch as it took this acceptance of defendant's proposition to *make the contract*, it must be that the contract is made where that acceptance takes place; and so the authorities hold.

"Supposing that the parties to an alleged contract are living, at the time of the contract, in different places, and that they negotiate by letter, the question arises which place, in case of conflict, is to be regarded as giving the applicatory law. Where the transaction consists in a proposition from one party and an acceptance from the other, the law, Savigny answers, is that of the place to which the proposition is sent, and from which the receiver forwards

his assenting reply. *It is at this place that the purposes of the parties for the first time coalesce.*"

Wharton on Conflict of Laws, § 421.

In *Allgeyer v. Louisiana*, 165 U. S. 578, the plaintiff in error, a resident of Louisiana, while in that state made a contract for insurance with a New York corporation, which issued him what is known as an open policy, covering generally cotton in bales purchased and shipped by him, etc. The policy provided that shipments applicable to it must be reported to the insurance company by letter addressed to its president, stating the name of the vessel, particulars of the shipment, etc., and that until such letter should be deposited in the post office no risk should attach. On each risk a new and separate policy was to be issued and delivered to the insured at New Orleans. The insured in Louisiana mailed this letter of notification addressed to the company in New York, the property insured being at the time in Louisiana. It was conceded in the case that the contract of insurance was made in the State of New York, where the policy was issued and the premiums paid.

In *Holder v. Aultman*, 169 U. S. 81, a written contract was signed by the plaintiff and by the agent of the defendant, in the State of Michigan. It contained a proviso, however, that it was not to be valid unless countersigned by the manager of defendant at Lansing, Michigan, and *approved at Akron, Ohio.* The paper was subsequently countersigned and approved as required by this proviso; and it was held that the contract was not made in Michigan, but in Ohio. The court says that it was "at Akron, in the State of Ohio, that the contract was approved by the plaintiff's secretary at its principal office, and then and there, for the first time, became a valid and binding contract between the parties. It cannot therefore be considered as 'made' within the meaning of the statute in question, at any earlier time, or other place."

In *Western v. The Genesee Mutual Insurance Co.*, 12 N. Y. 258, certain residents of Bellville, Canada, executed and delivered at that place to one Patterson, an agent for the defendant insurance company, an application for a policy of insurance on certain property located in Bellville, and at the same time paid to Patterson the cash premium for the insurance which they desired to obtain, and also executed and delivered to him a premium note, payable to defendant. The application, cash and note were forwarded to the home office of defendant in the State of New York, where the policy was executed and forwarded to Patterson, who delivered it to the assured. It was held that the contract was made in the State of New York.

"When the application was received and approved by the company, and the policy executed and put in course of transmission to the insured, the contract was complete and both parties became bound. * * * * * * * * * *

"The contract was consumated by the final assent on the part of the company."

In *Tayloe v Merchants' Fire Ins. Co.*, 9 How. 390, a written application was made by the plaintiff through a local agent at Fredericksburg, Virginia, of an insurance company whose home office was in Baltimore, Maryland, for a policy of insurance on certain

property in Virginia. The application was forwarded by the local agent to the office of the company at Baltimore, and a few days later the secretary of the company wrote a letter to the local agent acknowledging receipt of the application and stating that "Mr. Tayloe's risk will be taken at the same rate as Mr. Bernard's," &c. Before the premium was paid or the policy was delivered, the property was burned; and the company resisted payment on the ground that there was no completed contract of insurance. The court held, however, that "on the acceptance of the terms proposed, transmitted by due course of mail to the company, *the minds of both parties have met* on the subject, in the mode contemplated at the time of entering upon the negotiation, *and the contract becomes complete.*"

9 How. 400.

It is true that the question directly involved in that case was not the *place where*, but the *time when* the contract was made; but if it was made *when* the proposition of the one party was accepted by the other, then necessarily, it was made *where* that acceptance took place.

In the case of *Glover v. Equitable Mortgage Co.*, 87 Fed. Rep. 518, the contract for the loan was made in the State of Mississippi, where the loan company was located, although the note and mortgage were executed in Tennessee, where the borrower resided. This court held in an opinion delivered by Judge Pardee that the loan was made in the State of Mississippi.

"The agreement to make the loan on the security offered—*the meeting of minds*—was in the State of Mississippi, and it is clear from the evidence that the parties intended it should be a Mississippi contract."

See also the same effect:

State Mutual Fire Ins. Co. v Brinkley S. & H. Co., 61 Ark. 1;
Garrettson v. North Atchison Bank, 47 Fed. Rep. 867.

If the *contract* for the loan in this case was made in the State of Tennessee, then we submit the further proposition that the giving of the note and mortgage and payment of the money in pursuance of this contract, even if it could be held to be an Alabama transaction, would not render the loan a doing of business in Alabama by the complainant within the purview of the laws in question. As was said in the *Allgeyer* case, *supra:*

"We have, then, a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed within the State of New York. * * * The letter of notification did not constitute a contract made or entered into within the State of Louisiana. *It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside the state.*"

165 U. S. 588.

In the case of Hyde v. Goodnow, 3 N. Y. 266, an agent residing in Ohio, of an insurance company domiciled in the State of New York, received from a resident of Ohio an application for a policy, together with a note for the premium, and transmitted both to the office of the company in New York, where they were received,

passed upon and approved, and the policy was issued and transmitted to the applicant by mail. An Ohio statute in force at the time provided that no policy of insurance should be signed, issued or delivered in the State, or on property located therein, by any foreign corporation, except by an agent of such corporation who shall have obtained license as such; and that every policy issued or delivered contrary to the provisions of the act should be null and void. Suit being brought on the note given for the premium on this policy, the defense was that the agent of the insurance company had not obtained the license required by the Ohio statute, that therefore the policy of insurance was illegal and the notes given for the premium on the policy were without consideration.

The Court held, however, that the contract was not made in Ohio, but in New York, and that the statute had no application.

"The applications of the defendant for insurance could in no sense have been regarded as a contract until they had been accepted by the company. The agent did not assume to do anything which would bind the company. His office was to receive, and submit to the company, the defendant's propositions. Until the company acted upon such propositions, it was within the defendant's power at any time to recall them. Before the company had agreed to insure, the defendant, notwithstanding the execution and delivery of the notes and applications to the agent of the company, might have withdrawn his applications and upon his doing so, his notes would have been inoperative. Until then, the transactions were wanting in that mutuality which is essential to a valid contract. But when the company, having received the applications, accompanied with the notes, consented to insure, and issued its policies, what was before revocable became irrevocable. What was before a mere proposition, then became invested with the attributes of a contract, and from that time each party became bound for its performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's applications and issued and transmitted to him their policies. Of course they were contracts made in the State of New York, and not in Ohio."

3 N. Y. 270.

II.

THE TAKING OF THE NOTE AND MORTGAGE AND THE PAYMENT OF THE MONEY DID NOT CONSTITUTE A TRANSACTION OF BUSINESS IN ALABAMA BY THE PETITIONER.

As already stated, this note and mortgage were drawn up in Tennessee, and mailed to petitioner's traveling agent, to be by him delivered to Mr. Denson for execution. When executed, Mr. Denson then delivered the papers to one D. P. Goodhue, who had no connection with petitioner, and to whom petitioner had mailed its check payable to Mr. Denson for the amount of the loan, with instructions to Mr. Goodhue to deliver the check to Mr. Denson, when he should have properly executed the papers. The papers were

then sent to petitioner and the check was paid in the City of Chattanooga, by the bank on which it was drawn.

The only part which petitioner took in this transaction, was the payment of the money which Mr. Denson had borrowed from it; and that took place, confessedly, in the State of Tennessee. The fact that Mr. Denson signed in Alabama the papers necessary to procure the loan does not, as we submit, constitute a doing of business in Alabama by the petitioner.

On this proposition the case of *Holder v. Aultman*, *supra*, is in point. There the contract in controversy was fully executed by one of the parties, and delivered to the agent of the other, in the State of Michigan; but inasmuch as the final approval of the other party was given in another state the Supreme Court held that the contract was not made in Michigan. So in this case, considering the execution of the papers and the payment of the money as a separate transaction from the contract for the loan, the petitioner's part of this transaction—the drawing of the check and payment of the money—was performed in the State of Tennessee; and only those acts which the borrower was required to do *as a condition precedent* to petitioner's act, were performed in the State of Alabama.

But furthermore, we contend that in contemplation of law, the place of the note itself was the State of Tennessee, and not the State of Alabama.

The note expressly stipulates that it "is made with reference to and under the laws of the State of Tennessee."

Ex. "A" to Bill, Rec. p. 7.

"It is true that the place in which the obligation has its inception may be agreed upon by the parties as supplying the local law by which it is to be governed. But this is not from the force of the original local connection because the obligation may have, *from its very terms, its actual seat in another locality.* It is different, however, with the place of performance, which enters into the vitals of the obligation, so far as concerns its fullfillment. * * * To this place * * * the intentions of both parties converge."

Wharton on Conflict of Laws, §§ 398, 399.

"The general principle in relation to contracts made in one place to be executed in another, is well settled. They are to be governed by the law of the place of performance."

Andrews v. Pond, 13 Peters, 65, 78.

See also

Pritchard v. Norton, 106 U. S. 124.

The reason of this rule is, that the place of performance is presumed to be that which is in the contemplation of the parties when they make the contract; their "intentions converge" there; and in their minds they fix that as *the place of the agreement* In other words, the law fixes the place of the contract in accordance with the *presumed intention* of the parties. If, then, the intention of the parties is not left to presumption, but is expressly stated, it would seem that the law would locate the contract in accordance with that expressed intention, especially when it coincides with what the law would presume, in the absence of any expression.

We think the question is controlled by the same principle on

which is based the well known and well established rule that the parties to a note may, if they act in good faith, contract for a rate of interest which is valid either at the place where the note is made or where it is payable. The rule, as all the cases show, is based on the principle that the parties are presumed to contract with reference to that law under which the contract would be valid, rather than that under which it would be void, and the law simply gives effect to this presumed intention.

Wharton on Conflict of Laws, § 507;
Andruss v. People's B'ld'g, Loan and Savings Asso., 94 Fed. Rep. 575;
Dugan v. Lewis, 79 Tex. 246;
Andrews v. Pond, 13 Peters, 65;
Glover v Equitable Mortgage Co., 87 Fed. Rep. 518;
Eastern B. & L. Asso. v. Bedford, 88 Fed. Rep. 7.

If, then, the parties expressly stipulate that a contract is to be governed by the laws of the place of performance, under which it would be valid, no reason is apparent why the law should not as readily give effect to their expressed intention, as it would to their presumed intention where none is expressed, or why the intention of the parties, expressed or implied, should not be given as much weight on any other element of the contract, as on the question of interest.

In the case of *London Assurance v. Companhia DeMoagens*, 167 U. S. 149, 160, the Supreme Court said:

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia, by its agents, and that contract by its terms was to be performed in England.

* * * * * *

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, section 280 says: 'But where the contract is, either expressly or tacitly, to be performed in any other place, then the general rule is, *in conformity to the presumed intention of the parties*, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. *This would seem to be a result of natural justice.*'"

And in *Penn. Mutual Life Ins. Co. v. Mech. Sav. Bank & Trust Co.*, 72 Fed. Rep. 413, the Circuit Court of Appeals for the Sixth Circuit held that the stipulation of the parties that "the place of the contract shall be the city of Philadelphia, State of Pennsylvania" was controlling.

The mortgage is a mere incident to the debt, and its situs is that of the debt it secures although it may cover property elsewhere

Lauter v. Jarvis-Conklin Mortgage Trust Co., 85 Fed. Rep. 894, 896;
Pioneer B. & L. Asso., v. Cannon, 96 Tenn. 599;
Sullivan v. Sheehan, 89 Fed. Rep. 247;
Electric Lighting Co. of Mobile v. Rust, 117 Ala. 680;
U. S. Sav. & Loan Asso. v. Shain, 8 North Dak. 136.

III.

PETITIONER'S TRANSACTIONS IN ALABAMA.

The only representative petitioner had in Alabama at the time this loan was made was a traveling soliciting agent, who was employed to solicit subscriptions to stock and submit applications for loans.

The case of *Beard v. The Union and American Pub Co.*, 71 Ala. 60, is direct authority in support of the proposition that the transactions of this agent did not constitute a doing of business in Alabama by petitioner within the meaning and inhibition of these laws.

"The mere presence of an agent within the State, authorized to transact particular business not involving an exercise of the corporate powers or franchises, not a part of the business the corporation was created and organized to transact, is not within the proper meaning of the phrases 'do business' or 'does business' as employed in the constitution and the statutes. * * * *

"There are many acts of business a foreign corporation may do without coming within the constitutional or statutory provision."

Sullivan v. Sullivan Timber Co., 103 Ala. 371, 379.

But if we are mistaken in this, it is fully shown that the *contracts involved in this suit* were not made by this agent, and that he had no part in the transactions culminating in this loan except to transmit the papers back and forth. It is insisted, therefore, that even if the association infringed the laws of Alabama by sending this soliciting agent into the State, and thereby made itself amenable to the penalties prescribed for violation of said laws, it did not on that account forfeit the right to enforce contracts which it made *in the State of Tennessee*, with citizens of Alabama. The utmost extent to which the Alabama Courts have gone in construing these laws is to hold that contracts made *in Alabama* by non-resident or foreign corporations, without compliance with the Alabama laws, are unenforceable.

IV.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals says in its opinion that "it is perfectly clear that all the business of loaning money to Denson, *with the single exception that the association in Tennessee said 'yes,'* was transacted in Alabama."

Record, p. 71.

Conceding that this view of the case is correct, it is respectfully submitted that it sustains our contention that the contract sued on was made in Tennessee, and therefore was not a doing of business in Alabama. For there was no contract until the association said "yes" to Denson's application; and *when* and *where* it said "yes," *then* and *there* was the contract made. We think the proposition is fully sustained by the authorities hereinbefore cited.

With all deference to the opinion of the learned Court of Ap-

peals, it is respectfully submitted that it has been misled to the conclusion that this contract is unenforceable by overlooking the point suggested in the next preceding paragraph of this brief, that it is immaterial, so far as this case is concerned, if the association was illegally doing business in Alabama when this loan was made, unless *the very contract here sued on* was made in that State. The State of Alabama has not undertaken to prohibit the enforcement by the association of its contracts lawfully made in the State of Tennessee, as a penalty for the illegal transaction by it of business in the State of Alabama; nor could it do so.

It is further submitted that the Court of Appeals is mistaken in the statement that the payment of the money loaned took place in Alabama. The undisputed evidence is that the association had no money in the State of Alabama at the time the check in favor of Denson, for the amount loaned him, was drawn; and that the money was paid by the Chattanooga bank on which it was drawn, out of funds on deposit therein belonging to the association.

Record, p. 21.

It is true the cashier of the Gadsden bank, by whom the check was cashed for Denson, says that his best recollection is that he paid the money on the check "under an understanding with the said building and loan association, and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation." He further says that he "transmitted the check to our Chattanooga correspondent and the same was paid;" and that he paid the money to Denson on this check "as on any other negotiable exchange."

Record, p. 51.

But this evidence, instead of in any way contradicting, directly sustains and corroborates the contention that the association paid over the sum of money which it had agreed to lend Denson, in the State of Tennessee. The Gadsden bank, understanding from the association, or the Chattanooga bank, or both, that the check would be paid on presentation, was willing to, and did, take it and advance the money on it "as on any other negotiable exchange;" and the check was then forwarded to Chattanooga and paid to the person by whom it was presented, in accordance with the order of Denson, the original payee.

It is further submitted that the apprehension, expressed by the Court of Appeals, that this and other foreign corporations of the same kind "may safely flood the State of Alabama with soliciting agents, make all the negotiations for loans, take real estate securities therefor and fully transact all other business pertaining to their corporate functions as though incorporated therein" without complying with the requirements of the Alabama laws, should not be of controlling force in the determination of this case. The penalties imposed for violation of the laws in question are ample and stringent; and no reason is apparent why the courts should seek to add to the severity of the laws by reading into them additional penalties. But if the courts have power in their discretion to impose additional penalties to those prescribed by the statutes, it is submitted that the fact that the violation of the laws, if they have been violated, shown in the present case was not wanton or wilful,

but was due wholly to the ignorance on the part of the officers of the association of the laws of a foreign State, is a sufficient reason, especially in a court of equity, why that discretion should not be exercised.

V.

THE STATE OF ALABAMA HAD NO POWER TO PROHIBIT THE MAKING OF THE CONTRACT HERE INVOLVED, OR INTERFERE WITH ITS ENFORCEMENT.

There can be no question that the contract whereby Mr. Denson became a stockholder in the association was a Tennessee, and not an Alabama, transaction. The application for the stock was presented in Tennessee, acted on and granted in Tennessee; and the certificate of stock was issued in Tennessee, on its face is a Tennessee contract and is to be performed in that State.

Exhibit No. 3 to Denson's dep., Rec. p. 46.

It is true that the application of Mr. Denson for this stock was solicited by defendant's traveling agent in Alabama; but we think the case of *Beard v. The Union & American Pub. Co*, 71 Ala. 60, settles the proposition that the solicitation by this agent did not constitute a doing of business in Alabama by the association.

See also *Sullivan v. Sullivan Timber Co*, 103 Ala. 371, 379.

The State of Alabama has no right or power to forbid the making by its citizens of contracts outside the State and with citizens of other States; and we do not think it has assumed to do so.

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to *contract outside of the State* for insurance on his property" (or for the purchase of stock), "*a right of which the State legislation cannot deprive him?* We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the State statutes. * * * * * *

"When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case *where the contract was made outside the State and as such was a valid and proper contract.*

* * * * * * * * * * *

"The mere fact that a citizen may be within the limits of a particular State does not prevent his making *a contract outside its limits*, while he himself *remains within it.*"

Allgeyer v. Louisiana, 165 U. S. 578, 590, 591, 592.

Therefore Mr. Denson, a resident of Alabama, had a right to become a subscriber to stock in a Tennessee corporation, and the Tennessee corporation had a right to issue its stock to him; and such a transaction, carried on as this one was, was not a doing of business in Alabama, and the laws of Alabama could not prohibit it.

But having lawfully become a stockholder in the association, then Mr. Denson *became entitled to receive a loan* whenever there was money in the treasury, and he bid the highest premium for it.

For the petitioner is chartered and organized under the public statutes of Tennessee authorizing the creation of corporations for carrying on the business of building and loan associations, and the loan in controversy was made in accordance with the power conferred on petitioner by its charter, and in the manner prescribed by its by-laws.

Stipulation, Rec. p. 64.

The statutes under which petitioner was chartered and organized provide that the money in the treasury shall be offered for loan at stated meetings of the board of directors, and that "the stockholder who shall bid the highest premium for the preference or priority *shall be entitled* to receive a loan of two hundred dollars for each share held by such stockholder."

Shannon's Code of Tennessee, §§ 2136, 2151, 2177;
Tennessee Acts 1875, Ch. 142, § 14;
Tennessee Acts 1889, Ch. 267, § 1;
Tennessee Acts 1893, Ch. 12, § 1.

The bid of Mr. Denson was the highest that was offered for the sum of money which he desired, at the meeting at which his application was presented, and the security offered by him was satisfactory.

Record, p. 20.

He therefore became entitled, by virtue of his contract of membership, to obtain the loan; he acquired *a vested right* to it, which he could have enforced against the association by suit; and being a right which could have been enforced by suit, the association properly yielded to it without suit, and the State of Alabama had no power or right to interfere with the performance of such a contract.

In *Bedford v. Eastern B. & L. Asso.*, 181 U. S. 227, 241, this court says: "The building association was incorporated under the laws of New York to make loans to its members, and rights to a loan accrued to membership. The condition of a loan existing—means in the treasury, a tender of good security—the contingent right became a vested one, a contract was formed, and, can there be a doubt that it was enforcible against the association? If it could have been enforced by suit, it was properly yielded to without suit and possessed all legal sanctions."

While the power of the States to impose conditions upon foreign corporations doing business within their limits is recognized and undisputed, "manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations."

181 U. S. 242.

VI.

THE FAILURE TO COMPLY WITH THE ALABAMA LAWS, UNDER THE CIRCUMSTANCES SHOWN HERE, WOULD NOT RENDER THE NOTE AND MORTGAGE UNENFORCEABLE.

If we are mistaken in all the other propositions we have stated, and if it be held that this loan did involve a doing of business in

Alabama by the petitioner, in violation of the laws of that State, and that the State had the right and power to forbid the transaction, yet the laws in question do not specifically declare that contracts made in Alabama by foreign corporations, without complying with the requirements prescribed, are void, or even unenforceable. It is true the Supreme Court of Alabama has held that a foreign corporation will not be permitted to enforce a contract made in that State without compliance with these laws; but it bases this holding on the ground that it is contrary to public policy to permit the enforcement in Alabama courts of contracts made in violation of Alabama laws.

"But the law does not allow this result for the benefit of either of the offending parties, as being less censurable or more favored than the other. It only lets the parties, *who are in equal fault*, severely alone, as the surest mode of securing obedience to the authority of its mandates."

Farrior v. New England Mortgage Security Co., 88 Ala. 275, 278–279.

And it was on this authority and on the same ground that the Circuit Court of Appeals directed the dismissal of this suit.

Record, p. 73.

In the present case, we submit that the parties are not "in equal fault." The petitioner paid to the State of Alabama the license fee which was required from foreign corporations doing business in the State, and then, supposing it had the right to exercise its corporate franchises in the State, proceeded to lend its money to this defendant. The defendant has no vested right in a defense of this kind; and as the courts have permitted such defense to prevail only because of the fault and wilful disobedience to the law of the moving party, it ought not to be allowed in a case where such fault and wilful disobedience are shown not to exist. The doctrine is a harsh one at best, and there is no reason why it should be extended especially in a court of equity. No principle of public policy would be contravened by requiring defendants to repay the money borrowed from petitioner, and permitting a foreclosure of their mortgage; and we submit that, aside from all other questions, the Circuit Court of Appeals, instead of extending the rule of forfeiture beyond the limits to which the Alabama courts had gone, should have held that inasmuch as the failure to comply with the laws in question was due to an innocent mistake of the officers of the association, neither the letter nor the spirit of the decisions of the Alabama courts required that petitioner should be repelled from court.

In a somewhat similar case, involving the question whether a forfeiture should be decreed of the rights of a Nebraska corporation to exercise its franchises in the State of Iowa, on account of an inadvertent omission on its part to comply with the conditions prescribed by the Iowa statutes, the Supreme Court of Iowa said:

"It is not expressly provided in its articles, or in the statute, that such violations amount to a forfeiture. If it was so provided, it would only remain for the Court to determine whether such violation had occurred, but, not being so expressly provided, the Court is vested with a discretion, and may refuse a judgment of

ouster, if in its opinion the interests of the public do not require such a judgment.

* * * * * * * * *

"We are convinced that a permit was not applied for under the belief that it was not required. * * * This was a mistaken belief, but if the corporations proceeded under that belief they did not act wilfully, or with any wrongful intent. * * * We are clearly of the opinion, upon the whole record, that, though the Nebraska corporation has heretofore unlawfully exercised its corporate powers in this State, yet there is no public interest demanding that it be unconditionally ousted from the exercise of said privileges and franchises."

State, ex rel. v. Ry. & Bridge Co., 91 Iowa, 517, 529, 532.

For the reasons stated, we respectfully submit that the decree of the Circuit Court of Appeals was erroneous and should be reversed.

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